Filed 3/18/14 In re Makayla B. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re MAKAYLA B., a Person Coming Under the Juvenile Court Law.	2d Civil No. B250606 (Super. Ct. No. J069171) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. JARED G., Defendant and Appellant.	

Jared G. (Father), the biological father of Makayla B., appeals from the order of the juvenile court, pursuant to Welfare & Institutions Code section 366.26,[1] terminating his parental rights and finding Makayla adoptable. He contends the order must be reversed because the juvenile court did not comply with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)) and because it terminated his parental rights before completing a home study of Makayla's prospective adoptive parents. We affirm.

[1] All statutory references are to the Welfare & Institutions Code, unless otherwise stated.

Facts

Makayla B. was born in December 2012. She was detained by respondent the next day, after hospital staff determined Makayla was prenatally exposed to alcohol and amphetamine. Both of Makayla's biological parents have a history of substance abuse and homelessness. The juvenile court bypassed reunification services to Makayla's biological mother (Mother) because it found that Mother had a significant history of substance abuse, had prenatally exposed Makayla to amphetamine and alcohol, had unresolved mental health issues, and had a history of engaging in domestic violence.

Father also has a history of domestic violence and of other violent criminal behavior. When Makayla was born, he was incarcerated in an Oregon prison as a result of having assaulted Mother during her pregnancy with Makayla. Father was interviewed by telephone from prison. The social worker also spoke with Father's prison counselor. Father reported that he was being evaluated to participate in an alternative incarceration program designed to prevent recidivism and substance abuse relapses. He had attended AA meetings in prison and completed a domestic violence class. Father planned to take an anger management class as well. If Father was accepted into and successfully completed the alternative program, he could expect to be released by July 2013. If not, then his expected release date was in November 2013. Neither release date would have allowed Father to establish a parental relationship with Makayla before the six-month reunification period expired in June 2013. As a consequence, respondent recommended that the juvenile court bypass reunification services for Father. The juvenile court followed that recommendation.

At the December 27, 2012 detention hearing, Makayla's biological mother reported possible American Indian ancestry. Respondent investigated her claim of Indian ancestry by interviewing Mother, Mother's grandmother and her grandfather. Notice of the proceeding was provided to the Bureau of Indian Affairs, which did not respond. The juvenile court determined ICWA did not apply.

Father was never asked whether he was of American Indian ancestry. No ICWA investigation was conducted with regard to Father.

At a hearing on June 20, 2013, Father's counsel represented that he had recently been released from prison and was living in a halfway house. Father was not allowed to leave the state of Oregon. The juvenile court found Father was Makayla's biological father but did not qualify as her presumed father. (Fam. Code, § 7611, 7612.) At a hearing on July 8, 2013, the juvenile court found Makayla was adoptable and terminated the parental rights of both Father and Mother.

In January 2014, respondent contacted Father to inquire whether he has any American Indian ancestry. Father stated that he did not. On February 19, 2014, the juvenile court entered an order finding that ICWA does not apply to Makayla because there is no reason to believe she is an Indian child. We granted respondent's motion to augment the record on appeal to include the February 19, 2014 order and supporting documents.

Discussion

Father contends the order terminating his parental rights must be reversed because the juvenile court failed to comply with ICWA by inquiring whether he had any American Indian heritage. The federal statute does not expressly impose a duty on the juvenile court to inquire whether parents involved in a dependency proceeding have American Indian ancestry. (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.) ICWA does provide, however, that states may impose higher standards to protect the parents of an Indian child. (25 U.S.C. § 1921.) Section 244.3, subdivision (a) is one such standard. It imposes on the juvenile court and on respondent "an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child . . . ." (See also, Cal. Rules of Court, rule 5.481(a) [imposing same duty to inquire].)

Here, respondent and the juvenile court erred when they failed to inquire of Father whether Makayla qualifies as an Indian child based on any American Indian heritage he may claim. (*In re H.B., supra,* 161 Cal.App.4th at p. 121; § 224.3, subd. (a).) The error was, however, harmless because Father does not assert that he has any American Indian heritage. (*Id.* at pp. 121-122; see also *In re N.E.* (2008) 160 Cal.App.4th 766, 770-771.) He has made no offer of proof that he has American Indian

heritage or that Makayla would qualify as an Indian child based on his ancestry. To the contrary, when inquiry was belatedly made, Father admitted that he has no known American Indian heritage. Thus, the juvenile court and respondent erred by failing to ask Father in a timely manner whether he has American Indian heritage. (§ 224.3, subd. (a).) The error was, however, harmless because Father has no such heritage. (*In re H.B., supra,* 161 Cal.App.4th at pp. 121-122; *In re N.E., supra,* 160 Cal.App.4th at pp. 770-771.)

Father next contends the juvenile court erred in finding Makayla is adoptable before completing a home study of her prospective adoptive parents. In reviewing the juvenile court's finding that Makayla is adoptable, we must determine whether the record contains substantial evidence from which the juvenile court could find by clear and convincing evidence that Makayla is likely to be adopted within a reasonable time. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061; *In re Erik P.* (2002) 104 Cal.App.4th 395, 400.) The finding of adoptability focuses on whether the child is likely to be adopted given the child's age, physical condition and emotional state. (§ 366.21, subd. (i); *In re Josue G.* (2003) 106 Cal.App.4th 725, 733.) As a general rule, the fact that prospective parents have expressed an interest in adopting the child is substantial evidence of adoptability. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) There is no requirement that a home study be completed before the juvenile court finds a child is adoptable and terminates parental rights. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 166.)

When the juvenile court found Makayla adoptable, she was placed with a prospective adoptive family. Makayla has some developmental delays due to her prenatal exposure to amphetamine and alcohol. The prospective adoptive parents were aware of her special needs and expressed a desire to adopt her. In fact, the prospective adoptive mother has a master's degree in social work and is employed as a social worker with a local foster family agency. She also has personal experience with special needs children because her younger sister was born with Fetal Alcohol Syndrome. These facts constitute substantial evidence that Makayla is an adoptable child.

Conclusion

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Ellen Gay Conroy, Judge

Superior Court County of Ventura

California Appellate Project, under appointment by the Court of Appeal, Jonathan B. Steiner, Executive Director and Anne E. Fragasso, Staff Attorney, for Appellant.

LeRoy Smith, County Counsel, County of Ventura and Linda Stevenson, Assistant County Counsel, for Respondent.